

1 **CONTRACT FOR CITY SERVICES AND PROGRAMS FOR**
2 **THE DOWNTOWN DURHAM MUNICIPAL SERVICE**
3 **DISTRICT – FY-2013**
4

5
6 By and Between
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8
9 THE CITY OF DURHAM, NORTH CAROLINA
10

11 and
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13
14 DOWNTOWN DURHAM, INC.
15
16

17 This Contract (the “Contract”) is dated, made, and entered into as of the ____ day
18 of _____, 20 __, between the CITY OF DURHAM (“City”) and
19 DOWNTOWN DURHAM, INC. (“DDI” or “Contractor”), a 501(c) (6) non-profit
20 corporation organized and existing under the laws of North Carolina, having its principal
21 place of business at 115 Market Street, Suite 213, Durham, NC 27701.
22

23 WITNESSETH:
24

25 **WHEREAS**, the North Carolina General Assembly enacted “The Municipal
26 Service District Act of 1973,” (the “Act”) pursuant to Article V, Sec. 2(4) of the
27 Constitution of North Carolina; and,
28

29 **WHEREAS**, the Durham City Council established a Municipal Service District
30 pursuant to the Act on May 2, 2011 by adoption and approval of Resolution No. 9761,
31 titled “Resolution Establishing a Business Improvement District in Downtown Durham,
32 North Carolina” (the “BID Resolution”); and,
33

34 **WHEREAS**, the BID Resolution established a Municipal Service District (also
35 referred to as a Business Improvement District (“BID”)) located within the Downtown
36 Development Tier of the City of Durham specifically identified in the maps titled
37 “Downtown Improvement District” and prepared by Durham GIS dated April 28, 2011
38 and maintained by the Office of the City Clerk of Durham; and,
39

40 **WHEREAS**, under the authority of G.S. § 160A-536 (d), the City desires to enter
41 into this Contract with DDI to provide both basic city services and enhanced services and
42 programs within the BID.
43

44 NOW, THEREFORE, for and in consideration of the mutual terms and conditions
45 hereinafter contained, and other good valuable consideration, the Parties agree as follows:
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1.0 PURPOSE AND ENGAGEMENT

Pursuant to the BID Resolution the City finds a need for specialized services and programs within the BID, which comprises the downtown area and has experienced a marked increase in pedestrian intensity and activity due to various economic development efforts. Multiple public and private amenities would benefit from the specialized services and programs within the BID, which amenities include, but are not limited to, the Durham Performing Arts Center (DPAC), the Carolina Theater, the Durham Bulls Athletic Park, CCB Plaza, the Downtown Durham Marriott and Convention Center, West Village, American Tobacco Campus, Brightleaf Square, Golden Belt, Central Park and the numerous businesses and restaurants throughout the BID. The BID will receive an increase in street-level, appearance-related services, such as frequent sidewalk cleaning, and pressure-washing; street level hospitality services to direct people to key downtown sites and services while acting as safety eyes-and-ears within the BID District; increased directed marketing and promotion of downtown attractions within the BID; concentrated special event services; and concentrated economic development programs that build upon the momentum of existing development and leads to job creation, tax base growth and more downtown activity.

2.0 DEFINED TERMS

2.1 “BID” is the geographic area of the Municipal Service District (BID) located within the Downtown Development Tier of the City of Durham, specifically identified in the maps titled “Downtown Improvement District” and prepared by Durham GIS dated April 28, 2011 and maintained by the Office of the City Clerk of Durham.

2.2 “BID Resolution” is Resolution No. 9761, titled “Resolution Establishing a Business Improvement District in Downtown Durham, North Carolina” adopted and approved by the Durham City Council on May 2, 2011.

2.3 “BID Services” are all the services and programs that DDI is required to perform pursuant to this Contract within the BID, which services and programs are both (a) those cleaning and basic sanitation related city services set forth in subsection I of Exhibit A, and (b) those enhanced or additional city services and programs set forth in subsection II of Exhibit A.

2.4 “BID Services Budget” refers to the contracted budget amount allocated to the Contractor to perform the BID Services in accordance with this Contract pursuant to Section 6.0 below.

2.5 “Citizen Service Request” is a request to the Contractor from a citizen, whether directly or through the City (e.g., “Durham OneCall”), to perform a “clean and safe” service within the BID as set forth in subsection “I. Clean and Safe Services” of Exhibit A.

2.6 “City Funds” refers to all funds received by DDI under this Contract to perform the BID Services.

96
97 **2.7** “Effective Date” refers to the date upon which the City Council adopts and
98 approves the additional tax rate on property within the BID. The Effective Date shall
99 also be the trigger date for the duties and obligations of the Parties under this Contract.

100
101 **2.8** “Generally Accepted Accounting Principles” or “GAAP” “Generally
102 Accepted Accounting Principles” or “GAAP” shall mean those conventions, rules,
103 procedures, and practices, consistently applied, affecting all aspects of recording and
104 reporting financial transactions which are generally accepted by major independent
105 accounting firms in the United States. Any financial or accounting terms not otherwise
106 limited or defined in this Contract shall be construed and applied according to Generally
107 Accepted Accounting Principles.

108
109 **2.9** “Implementing Department” shall be the city’s Office of Economic and
110 Workforce Department (“OEWD”), the city department primarily responsible for the
111 administration and oversight of this Contract.

112
113 **2.10** “Including” The word “including” and any variants thereof, whether
114 capitalized or not, shall mean “including, but not limited to” or otherwise imply that it is
115 without limitation.

116
117 **2.11** “Independent Accountant” is a firm of independent certified public
118 accountants, or an independent certified public accountant, chosen by Contractor and
119 subject to the approval of City which shall not be unreasonably withheld, delayed or
120 conditioned.

121
122 **2.12** “Legal Requirements” are all material laws, statutes, ordinances, rules,
123 regulations, permits, licenses, and requirements of all governments or regulatory
124 authorities, that now or hereafter may be applicable to the BID.

125
126 **2.13** “Parties” means the parties to this Contract.

127
128 **2.14** “Service Standards” are the performance standards of services and
129 programs to be provided by DDI under this Contract, which service standards shall be
130 conducted in a manner (i) consistent with the requirements and limitations set forth in this
131 Contract; (ii) consistent with current prudent public services and management practices to
132 promote general public safety and welfare; (iii) comparable to standards applicable to
133 other BID areas found in other similarly situated downtown city settings; (iv) consistent
134 with keeping the BID in a clean, sanitary and attractive condition, and (v) performed in
135 compliance with Legal Requirements.

136
137 **2.15** “Subcontractor” means a subcontractor that Contractor engages as a
138 subcontractor for the performance of certain of the BID Services.

139
140 **2.16** “Subcontract” means the contract that Contractor executes with a
141 Subcontractor for the performance of certain of the BID Services.
142

3.0 TERM OF AGREEMENT AND RENEWALS.

The term of this Contract shall be 1 year (“Term”) according to the City’s fiscal calendar, beginning on July 1, 2012 to June 30, 2013. Unless Contractor provides the City with at a least 90-day prior written notice of its intention not to renew, the City, in the discretion of the City Manager, shall have the option to renew the Contract for two (2) additional one (1) year terms with an amendment extending the term if for each additional fiscal year the City Council approves the appropriate funds for the BID Services covered under this Contract. The effective date for each renewal shall be July 1, unless stated differently in the renewal amendment. If the City elects not to renew for one or both of the 2 additional one-year terms, such non-renewal procedure shall follow the Termination for Convenience procedure described in Section 11.1 below, including the requirement that the City will give Contractor 90-days notice of its intention not to renew.

4.0 SCOPE OF CONTRACT SERVICES TO BE PERFORMED.

The BID Services are listed and described in Exhibit A, titled “Scope of BID Services.” DDI affirmatively represents that it shall provide the BID Services set forth below during the subject fiscal year. By the end of the subject fiscal year, and before entering into any amendment for a following fiscal year, DDI shall use the City Funds paid to it by the City pursuant to this Contract exclusively in the category of the BID Services described in this Section 4.0 and Section 6.0. Pursuant to Section 7.0, Contractor shall provide an accounting to the City of all unused City Funds within the BID Services categories prior to 30 days after the end of the Term. At the discretion of the City, any unused City Funds shall be returned to the City within 20 days of notice by the City, unless such funds are incorporated into the next fiscal amendment to the Contract.

5.0 CONDUCT OF CONTRACTOR

Contractor shall at all times perform the BID Services consistent with the Service Standards defined by this Contract. Contractor will undertake commercially reasonable efforts to commence provision of the BID Services as soon as possible after the Effective Date subject to the City’s payment of the initial invoice as described in Section 6.1 and subject to the understanding that the BID Services will not be fully implemented immediately after the Effective Date.

5.1 Citizen Service Request Reporting. – Contractor shall respond to Citizen Service Requests as promptly as reasonably feasible during operational hours. Contractor shall maintain records of the description, date and time when the Citizen Service Request is first received and the date, time and description of resolution (if any) of the Citizen Service Request. Contractor shall maintain and record additional details of the Citizen Service Request as may be necessary for the City to evaluate the services performed. Contractor shall cooperate and consult with Durham One-Call and City administration to allow adequate routing and responses to Citizen Service Requests, which response time shall be as good, or better, than the City’s historic response time. At the request of the

City, the Contractor shall submit an accounting of Citizen Service Request information with its detailed quarterly report of program activities required under Section 7.0 below.

5.2 Security. – Contractor is not authorized to perform any security or law enforcement activities under this Contract. However, it is agreed that while performing the BID Services, Contractor’s employees or subcontractor employees may observe suspicions or unsafe activities by others. Contractor shall coordinate with the City regarding appropriate protocol in addressing observed unsafe or potentially criminal activities within the BID. If required by the City, Contractor shall promptly report to the Durham Police Department any incidents involving what may appear to be suspicious, unsafe, or criminal activities. The Contractor shall make a report of all such activities that are reported to the Durham Police Department and include a summary of all such reports in the Contractor’s quarterly reporting of program activities and accomplishments pursuant to Section 7.0. Contractor shall maintain a copy of each report and deliver the same to the City, upon request. This report shall be delivered to the Office of Economic and Workforce Development to the attention of the Director.

5.3 Private Property. Contractor is prohibited from performing any BID Services for the exclusive benefit of private properties or private entities. Contractor must abide by all Legal Requirements in performing any BID Services on or near private property.

6.0 PAYMENT AND USE OF CITY FUNDS

The City shall make payments to DDI as provided herein for each category of BID Services for the fiscal year according to the two (2) budget categories identified in Exhibit B, titled “BID Services Budget for FY-2013.” The annual fiscal payment to Contractor for the BID Services is as follows:

<u>CATEGORY OF SERVICE</u>	<u>ESTIMATED ANNUAL BUDGET</u>
BID Services Budget	\$630,000.00**

** estimated

6.1 Estimated BID Services Budget. -- Contractor acknowledges that the “BID Services Budget” is only an estimate of the City Funds available for the Contract based upon the anticipated BID tax rate to be approved by the City Council on the Effective Date. Such BID Tax rate will determine the BID tax revenues collected from the additional taxes levied on property within the BID pursuant to the BID Resolution. In other words, the BID tax revenues cannot be reliably estimated, until after the Effective Date.

6.2 Amendment to BID Services Contract. The Parties agree to amend the Contract to address any substantive shortfall in the BID Services Budget, which amendment may also incorporate a reduction in BID Services. Notwithstanding the foregoing, the Contractor acknowledges and agrees that any shortfall in the estimated BID Services Budget of 5% or less shall not be considered substantive and shall not require any Contract amendment. The City Manager shall have the authority to make any

amendments to this Contract as a result of a substantive shortfall in the BID Services Budget (as described above), or if the City decides to augment the BID Services provided by the Contractor as a result of BID tax revenues received in excess of BID tax revenues originally assumed in determining the expected BID Services Budget. The City will keep Contractor informed of BID tax revenues actually collected and if it appears that BID tax revenues collected during the Term will result in an overage, the City will meet with Contractor to discuss the impact of such overage on the Contract, if any.

6.3 Form of Invoices. -- Except for the initial invoice (described below), the Contractor shall send invoices to the City on a monthly basis equal to one-twelfth (1/12) of the BID Services Budget. In order for the Contractor to receive advance payments from the City for the BID Services to be rendered, the City must receive the appropriate invoice at least 20 days prior to commencement of the BID Services for the specified time period. The initial invoice shall be delivered to the City immediately after the Effective Date and in an amount equal to 2 months payment (i.e., 1/6 of the BID Services Budget). Each subsequent invoice shall be delivered monthly to the City at least 20 days in advance of the month for which services are to be provided. For example, after the initial invoice is delivered, the next invoice shall be delivered at least 20 days prior to the 3rd month of BID Service to be provided.

6.4 Payment of Undisputed Amounts. -- The City shall make payment on the invoices from the Contractor within 20 days from receipt of the invoice. The City shall not be obligated to pay Contractor any payments, fees, expenses, or compensation other than those authorized by this section. Such payment schedule may be amended by written consent of the City and Contractor. The City Manager and the Director of the Implementing Department (the "Director") shall have authority to give that consent on behalf of the City. The City, in its sole discretion, and without affecting its other rights and remedies, may delay or cancel any or all of those payments for failure by Contractor to comply with any of the provisions of this Contract, including deadlines for submitting any accounting, audit, statement, information, record, documentation, or report. The City Manager or Director shall have the authority to decide whether Contractor has complied with this Contract, including the attachments. Unless the City otherwise specifies, if the withholding is designated to be a delay of payment instead of a cancellation of payment, the payment so delayed shall be made when Contractor has submitted the missing items, provided that such items are received by the City within 45 days after the date that they were due. If any of said missing items is not received by the City before the expiration of the additional 45-day period, then the amounts so withheld shall not be paid to Contractor unless the missing items are later received by the City before expiration of the current fiscal year. If the City does not delay or cancel in one instance, the City shall still have the right to delay or cancel after any other instance of failure by DDI.

6.5 Repayment of Funds. -- DDI shall repay to the City the full amount of any City Funds lost, misapplied, unaccounted for, not used (as provided in Sections 4.0 and 7.0), or inadequately accounted for in violation of this Contract.

7.0 REPORTING REQUIREMENTS

7.1 General Accounting DDI, at DDI's sole expense, shall account for all City Funds received from the City under this Contract and all expenditures made from City Funds according to each category of BID Services detailed under Exhibit A. DDI shall submit a detailed quarterly report of program activities and accomplishments associated with the expenditure of City Funds to the City's Office of Economic and Workforce Development (the "Implementing Department"). That report shall be submitted within 20 days after each quarter of the fiscal year in accordance to the reasonable requirements of the Implementing Department and shall include a detailed description of the services performed in accordance with the service categories referenced in Exhibit A. If necessary, the Department may require additional detailed information (in addition to the required report), including but not limited to accounts, records, budget-to-actual statements, and other supporting documentation. As part of the final quarterly report for the subject fiscal year, Contractor shall include an annual summary of the same information required as part of each quarterly report. If, as part of the final quarterly review, the City determines that the payment of City Funds exceeded the actual costs of BID Services provided, including a reasonable allocation of Contractor administrative costs, expenses, and overhead (including staff salaries and benefits), the City shall have the right to require Contractor to return the unused funds. Without limiting the preceding sentence, it is agreed that, if requested in writing by the City, Contractor shall make all of that information available for inspection and audit by the City at any time during the workday of the Implementing Department or such other department of the City that the City Manager specifies in writing to Contractor.

7.2 Annual Audit Report. – Annually, DDI, at DDI's sole expense, shall obtain an audit of its financial statements. The audit shall be performed by an Independent Accountant. This audit shall be conducted in accordance with Generally Accepted Accounting Principles standards, and the financial statements shall be prepared in conformity with generally accepted accounting principles. DDI shall see that the City's Director of Audit Services receives the audit report within four months after the close of the City's fiscal year. If the independent annual audit shows a difference in the accounting of City Funds from the final quarterly report required under sub-section 7.1 above, the Parties agree to make the appropriate payment adjustment in accordance with the Contract consistent with the findings of the independent Audit.

8.0 CONTRACTOR REPRESENTATIONS AND WARRANTIES.

8.1 DDI Warranties and Representations. During the term of this Contract, DDI warrants, represents and covenants that all information provided or submitted to the City regarding the proposed use of all the City Funds being granted by the City to DDI pursuant to this Contract for described programs shall be accurate and true. DDI represents that it is an organization described by Section 501(c)(6) of the Internal Revenue Code and that it has provided the City with a valid, un-revoked letter from the Internal Revenue Service that it is such an organization.

8.2 No Liens or Encumbrances -- The execution, delivery and performance of this Contract by Contractor does not and will not, with or without the giving of notice or the lapse of time, or both, (i) result in any violation of its constitutional documents; (ii)

result in a breach of, or conflict with, any of the terms or provisions of, or constitute a default under, or result in the modification or termination of, or result in the creation or imposition of any encumbrance upon any of its properties or assets pursuant to any indenture, mortgage, note, contract, commitment or other contract or instrument to which it is a party; or (iii) violate any existing applicable law, rule, regulation, judgment, order or decree of any governmental agency or court, domestic or foreign, having jurisdiction over it or its assets.

9.0 CITY LOGOS AND BRANDING.

9.1 Use of City Logo or Brand -- Contractor shall include the City of Durham's name and/or logo in all communications with respect to BID Services provided, which communications are produced during the Term. The style of presentation (text and/or logo, font size, tec.) shall be determined by the Contractor. Provided, however, at a minimum the following statement (where applicable) shall be inserted: "Funding for this product/service has been provided by the City of Durham." It is generally expected that when another person or entity is identified in the communication as a sponsor, donor, or contributor with respect to the same BID Services, and that person's or entity's logo appears in the communication, the City's logo would also appear. When the style of presentation is based on the amount of financial support provided, the City's name and/or logo shall be treated equally with other supporters providing similar financial support, and shall be based on the total amount of City funds received and to be received pursuant to this Contract by the Contractor.

10.0 EXHIBITS

The following Exhibits are made a part of this Contract:

Exhibit A - "Scope of BID Services" containing 4 pages; and,

Exhibit B -- "BID District Services Budget for FY-2013" containing 1 page;

In case of conflict between an exhibit and the text of this Contract excluding the exhibit, the text of this Contract shall control.

11.0 TERMINATION PROVISIONS.

11.1 Termination for Convenience ("TFC") by City (a) Procedure. Without limiting any party's right to terminate for breach, the parties agree that the City may, without cause, and in its discretion, terminate this Contract for convenience by giving the Contractor at least a 90-day advanced written notice that refers to this section ("TFC Notice"). TFC shall be effective at the time indicated in the notice but at least 90-days from the date of the receipt of the TFC Notice. (b) Obligations. Upon TFC, all obligations that are still executory on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions shall remain in force. At the time of TFC Notice or as soon afterwards as is practical, the Contractor shall provide a final accounting and verification of all direct contractual costs and charges to be incurred by Contractor as a result of TFC, including any Subcontractor termination costs and charges. (c) Payment. Within 20 days after the TFC Notice date, the City shall pay the Contractor one hundred dollars as a TFC fee; provided, however, the City shall not be required to pay a TFC fee in the event of non-renewal of this Contract as described in Section 3. Within 20 days after the TFC effective date, the City

shall pay the Contractor for all BID Services performed except to the extent previously paid for. BID Services shall be paid for in accordance with the method (unit prices, hourly fees, etc.) to be used for payment had the BID Services been completed except to the extent it would be inequitable to either party. Such payment to the Contractor may include the costs and charges related to reasonable equipment amortization obligations to a Subcontractor but only over the remaining Term of this Contract, including any possible extensions. Such payment for reasonable equipment amortization obligations shall not exceed (i) \$65,000.00, if termination occurs during the first one-year of the Term or the City does not renew this Contract after the first one-year term; (ii) \$43,333, if the City renews this Contract for one additional one-year term and terminates this Contract during such renewal term; or (iii) \$21,667, if the City renews this Contract for a second one-year term and terminates this Contract during such second renewal term. If the BID Services were to be paid for on a lump-sum basis, the City shall pay the part of the lump sum that reflects the percentage of completion attained for that BID Service. The Contractor shall not be entitled to any payment because of TFC except as stated in this section, whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

11.2 Termination for Convenience by Contractor. (a) Procedure. Without limiting any party's right to terminate for breach, the parties agree that the Contractor may, without cause, and in its discretion, terminate this Contract for convenience by giving the City at least a 90-day advanced written notice that refers to this section ("TFC Notice"). TFC shall be effective at the time indicated in the notice but at least 90-days from the date of the receipt of the TFC Notice. (b) Obligations. Upon TFC, all obligations that are still executory on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions shall remain in force. At the time of TFC Notice or as soon afterwards as is practical, the Contractor shall provide a final accounting and verification of all direct contractual costs and charges to be incurred by Contractor as a result of TFC, excluding any costs, expenses or charges that may be incurred beyond the effective date of the TFC (e.g., the City shall not pay Contractor for any costs, expenses or charges related to equipment amortization obligations to subcontractor(s) beyond the effective date of TFC). (c) Payment. Within 20 days after the TFC Notice date, the Contractor shall pay the City one hundred dollars as a TFC fee. Within 20 days after the TFC effective date, the City shall pay the Contractor for all BID Services performed except to the extent previously paid for. BID Services shall be paid for in accordance with the method (unit prices, hourly fees, etc.) to be used for payment had the BID Services been completed except to the extent it would be inequitable to either party. If the BID Services were to be paid for on a lump-sum basis, the City shall pay the part of the lump sum that reflects the percentage of completion attained for that BID Service. The Contractor shall not be entitled to any payment because of TFC except as stated in this section, whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

12.0 CONTRACTOR INSURANCE

Contractor shall maintain insurance not less than the following:

Commercial General Liability, covering:

- Premises/operations
- Products/completed operations (two years minimum, from project completion)
- Broad form property damage
- Contractual liability
- Independent contractors, if any are used in the performance of this Contract
- City of Durham must be named additional insured, and an original of the endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, then agent may so indicate in the GL section of the certificate, in lieu of an original endorsement)
- Combined single limit not less than \$1,000,000 per occurrence, with an annual aggregate on not less than \$2,000,000.

Commercial Auto Liability, covering:

- Symbol 1, all vehicles
- Combined single limit of \$1,000,000
- City of Durham must be named additional insured

Workers' Compensation Insurance, covering:

- Statutory benefits;
- Covering employees; covering owners partners, officers, and relatives (who work on this Contract) (this must be stated on the certificate)
- Employers' liability, \$1,000,000
- Waiver of subrogation in favor of the City of Durham

Insurance shall be provided by:

- Companies authorized to do business in the State of North Carolina
- Companies with Best rating of A-, VII or better.

Insurance shall be evidenced by a certificate:

- Providing notice to the City of not less than 30 days prior to cancellation or reduction of coverage
- Certificates shall be addressed to:
City of Durham, North Carolina
Attention: (your name and address)

13.0 INDEMNIFICATION

13.1 Indemnification. To the maximum extent allowed by law, DDI shall defend, indemnify, and save harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this Contract as a result of acts or omissions of DDI or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. In performing its duties under this subsection "13.1," the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City.

13.2 Definitions. As used in subsections “13.1” above and “13.3” below -- “Charges” means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within “Charges” are (1) interest and reasonable attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or orders -- including but not limited to any such alleged violation that arises out of the handling, transportation, deposit, or delivery of the items that are the subject of this Contract). “Indemnitees” means City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor.

13.3 Other Provisions Separate. Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this Contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this Contract.

13.4 Survival. This section shall remain in force despite termination of this Contract (whether by expiration of the term or otherwise) and termination of the services of the Contractor under this Contract.

13.5 Limitations of the Contractor’s Obligation. If this section is in, or is in connection with, a contract relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, then subsection “13.1” above shall not require the Contractor to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Indemnitees.

13.6 Notice and Cooperation. Contractor shall notify the City promptly of any claim or complaint that may arise from Contractor’s obligations under this Contract. Contractor agrees to provide full and complete cooperation in addressing notices of potential claims or complaints against Contractor or the Indemnitees.

14.0 RELATIONSHIP OF THE PARTIES

It is the express intention of the Parties hereto that Contractor and its subcontractors is and shall be deemed an independent contractor under this Contract and that no partnership shall exist between the City and Contractor (including its subcontractors). Contractor shall have full discretion in determining the method for performing its duties and obligations under this Contract and shall be fully responsible for payment of any income taxes, Social Security taxes, unemployment compensations taxes, workers’ compensation insurance premiums and other taxes with respect to itself, its employees and its subcontractors. This Contract does not constitute Contractor as the agent, legal representative or employee of the City for any purpose whatsoever.

15.0 MISCELLANEOUS PROVISIONS

518 **15.1 Livable Wage.** (a) In the event of a finding by the City Manager of City
519 or a judicial officer that any Service Worker has been paid less than the compensation to
520 which the Service Worker is entitled under the City's Livable Wage ordinance, the
521 Contractor shall make restitution to the Service Worker for the amount due. The
522 Contractor shall also pay liquidated damages to the City in the amount of Fifty Dollars
523 (\$50.00) per day for each employee so underpaid, provided, however, that these damages
524 shall not be assessed for wage underpayment violations to any individual which amount
525 to a total of less than One Dollar (\$1.00) in any payroll period. Should a Service Worker
526 be found to have been discriminated against for seeking to enforce the provisions of the
527 City's Livable Wage ordinance, and if the Service Worker has been terminated from
528 employment, he or she shall be reinstated upon an order to do so from the City Manager
529 or a judicial officer. A flyer stating the City of Durham's Livable Wage amount shall be
530 posted at the workplace of the Contractor and all subcontractors in a location easily seen
531 by all employees. The Contractor agrees to comply with applicable provisions of the
532 ordinance, including but not limited to its severability provisions. Definitions of terms in
533 this paragraph are stated in the ordinance. "Service Contractor" includes DDI and all of
534 its subcontractors.

535
536 (b) The terms and provisions of Section 15 shall be null and void if the Durham
537 Livable Wage ordinance is terminated or repealed and the obligations of DDI under the
538 above section shall be modified if and to the extent that the Durham Livable Wage
539 ordinance is modified.

540
541 **15.2 Equal Opportunity/Equity Assurance.** The provisions of this section
542 15.2 are intended to conform with the requirements of Article III of Chapter 18 of the
543 Durham Code of Ordinances.

544
545 **15.2.1 General Requirements.**

546
547 (a) Contractor shall meet with the Director of the City's Department of
548 Equal Opportunity/Equity Assurance (EO/EA) annually to discuss potential
549 contracting opportunities for goods and services for small disadvantaged
550 businesses certified by the City (SDBEs).

551
552 (b) The Director may set project specific goals as the Director
553 determines to be generally applicable under Article III of Chapter 18 (as amended
554 from time to time) in City contracting.

555
556 (c) In all solicitations for which goal(s) are established, Contractor
557 will not enter into contracts for goods or services without first soliciting bids from
558 SDBEs and requiring bidders to submit a Participation Plan to meet the goal(s).
559 Bidders must state their SDBE participation in a manner like that required by
560 bidders on contracts to be awarded by the City. If a bidder fails to achieve the
561 goal(s), the bidder must submit documentation to Contractor of its good faith
562 efforts to achieve the goal(s) within two working days after bid opening.
563 Contractor shall take all reasonable actions needed to see that bidders comply

with this subsection. Contractor shall make bids and documentation of good faith efforts available to the Director.

(d) Contractor will notify the Director of EO/EA of upcoming contracting opportunities to ascertain the availability of SDBEs that might be capable of supplying the pertinent goods or services. Each such notice shall be given in a manner and schedule so that the SDBEs will have a reasonable amount of time to respond.

(e) Contractor shall comply with all applicable provisions of Article III of Chapter 18. The failure of Contractor to comply with that chapter shall be a material breach of contract which may result in the rescission or termination of this Contract and/or other appropriate remedies in accordance with the provisions of that chapter, this Contract, and State law. The Participation Plan submitted by Contractor in accordance with that chapter is binding on Contractor.

(f) Section 18-59(f) of Article III of Chapter 18 provides, in part, “If the City Manager determines that [Contractor] has failed to comply with the provisions of [this Contract], the City Manager shall notify [Contractor] in writing of the deficiencies. [Contractor] shall have 14 days, or such time as specified in [this Contract], to cure the deficiencies or establish that there are no deficiencies.” It is stipulated and agreed that those two quoted sentences apply only to [Contractor’s] alleged violations of its obligations under Article III of Chapter 18 and not to [Contractor’s] alleged violations of other obligations.

15.2.2 Definitions. In this document, words, including “SDBE” and the “Director” shall have the meaning assigned in Article III of Chapter 18, unless the context requires otherwise. “Article III of Chapter 18” means Article III of Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance).

15.3 Non-Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

15.4 Severability. Any provision of this Contract that is prohibited or unenforceable shall be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining portions of this Contract.

15.5 Notices. All notices and other communications required or permitted by this Contract, unless otherwise provided for in this Contract, shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:
City Manager
City of Durham

611 101 City Hall Plaza
612 Durham, NC 27701
613 Fax (919) 560-4949.
614

615 With a copy to:
616 Director of the Office of Economic and Workforce Development
617 City of Durham
618 101 City Hall Plaza
619 Durham, NC 27701
620 Fax (919) 560-4986
621

622 To the Contractor:
623 Downtown Durham, Inc.
624 Attn: President
625 115 Market Street, Suite 213
626 Durham, NC 27701
627 Fax (919) 682-1980
628

629 **15.6 Change of Address. Date Notice Deemed Given.** A change of address,
630 fax number, or person to receive notice may be made by either party by notice given to
631 the other party. Any notice or other communication under this Contract shall be deemed
632 given at the time of actual delivery, if it is personally delivered or sent by fax. If the
633 notice or other communication is sent by United States mail, it shall be deemed given
634 upon the third calendar day following the day on which such notice or other
635 communication is deposited with the United States Postal Service or upon actual
636 delivery, whichever first occurs.
637

638 **15.7 Performance of Government Functions.** Nothing contained in this
639 Contract shall be deemed or construed so as to in any way estop, limit, or impair the City
640 from exercising or performing any regulatory, policing, legislative, governmental, or
641 other powers or functions.
642

643 **15.8 Compliance with Law.** In performing all of their respective obligations
644 under this Contract, the Contractor and the City shall comply with all Legal
645 Requirements.
646

647 **15.9 City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE
648 BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO
649 PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO
650 PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND
651 VENDORS UNDER CITY CONTRACTS.
652

653 **15.10 EEO Provisions.** In this section, “the Contractor” means the Contractor,
654 and “this Contract” means this Contract. During the performance of this Contract the
655 Contractor agrees as follows:
656

15.10.1 The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Contractor shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions.

15.10.2 The Contractor shall in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap.

15.10.3 The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining Contract or other contract or understanding.

15.10.4 In the event of the Contractor's noncompliance with these EEO provisions, which Contractor fails to cure after the City gives Contractor notice of such noncompliance, the City may cancel, terminate, or suspend this Contract, in whole or in part, and the City may declare the Contractor ineligible for further City contracts.

15.10.5 Unless exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing this Contract and in every subcontract related to this Contract so that these EEO provisions will be binding upon such subcontractors and vendors.

15.11 No Third Party Rights Created. This Contract is intended for the benefit of the City and Contractor and not any other person.

15.12 Modifications. Entire Contract. A modification of this Contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City. This Contract contains the entire Contract between the parties pertaining to the subject matter of this Contract. With respect to that subject matter, there are no promises, contracts, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Contract.

15.13 Assignment. Successors and Assigns. Without the City's written consent, the Contractor shall not assign (which includes to delegate) any of its rights

(including the right to payment) or duties that arise out of this Contract; provided, however, Contractor may subcontract certain clean and safe services to a Subcontractor. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Contract and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Contractor's duties that arise out of this Contract and all of the City's claims that arise out of this Contract. Without granting the Contractor the right to assign, it is agreed that the duties of the Contractor that arise out of this Contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

15.14 City's Manager's Authority. To the extent, if any, the City has the power to suspend, terminate or amend this Contract or the Contractor's services under this Contract, that power may be exercised by the City Manager without City Council action.

15.15 Principles of Interpretation. In this Contract, unless the context requires otherwise: The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and Contracts shall be deemed to include all amendments to them. The word "shall" is mandatory.

15.16 North Carolina Right to Work. The parties hereto agree and understand that the law in effect as of the date of this Contract provides that North Carolina is a right to work state and that the City is prohibited from collective bargaining. The parties agree that changes in those laws shall not affect the obligations of the parties to comply with this Contract.

15.17 Arm's Length Transaction. The Parties agree that this Contract is the result of arm's length negotiations, and that any ambiguity or uncertainty herein, if any, shall not be interpreted against either party.

15.18 Choice of Laws. The validity and construction of this Contract shall be determined in all respects in accordance with the laws of the State of North Carolina.

IN WITNESS WHEREOF, the City and the Contractor have caused this Contract to be executed under seal themselves or by their respective duly authorized agents or officers.

[SIGNATURES TO APPEAR ON FOLLOWING PAGES]

*Contract for City Services and Programs for the Downtown Durham
Municipal Service District—FY-2013*

By the CITY OF DURHAM:

By: _____

Preaudit Certification, if necessary

By DOWNTOWN DURHAM, INC.

By: _____

Title of officer: _____

(Affix corporate seal.)

State of _____ ACKNOWLEDGMENT BY
DOWNTOWN DURHAM, INC.

County of _____

I, a notary public in and for the aforesaid county and state, certify that

_____ personally appeared
before me this day and stated that he or she is (strike through the inapplicable:)
chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/
treasurer/ chief financial officer of DOWNTOWN DURHAM, INC., a corporation, and
that by authority duly given and as the act of the corporation, he or she signed the
foregoing Contract with the City of Durham and the corporate seal was affixed thereto.

This the _____ day of _____, 20____.

Notary Public

My commission expires:
